IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

NO. 42853-9-II

APPEAL FROM CLALLAM COUNTY NO. 10-1-00387-7

STATE OF WASHINGTON,

Respondent,

vs.

VONDA VALISA PRITCHARD,

Appellant.

BRIEF OF RESPONDENT

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Issue One: Whether a criminal information, not objected to at trial, contains the essential elements of vehicular assault because it defines the alternative ways of committing the crime and links the alternative ways of committing the crime to show each alternative way caused substantial injuries to the victim?

ARGUMENT: THE CRIMINAL INFORMATION PASSES CONSTITUTIONAL MUSTER BECAUSE IT SETS FORTH ALL THE FACTUAL AND LEGAL ELEMENTS NECESSARY TO CONVICT MS. PRITCHARD OF VIOLATING RCW 46.61.522, THE VEHICULAR ASSAULT STATUTE.

1. Standard of Review:

State v. Rivas, ___ Wn.App. ___ (No. 41416-3, Div. 2, 6/19/2012) establishes the standard of review:

> [Every defendant] has a constitutional right to be informed of the nature and cause alleged against him in the charging document. *State v. McCarty*, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000). We review challenges to the sufficiency of a charging document *de novo*. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).
>
> To be legally sufficient, an information or other charging document must state each essential element of an alleged crime, including all statutory and nonstatutory elements. *State v. Courneya*, 132 Wn. App. 347, 350, 131 P.3d 343 (2006). Where an

information fails to include an essential element of the alleged crime, it fails to charge a crime. *Courneya,* 132 Wn. App. at 351. Further, an information must also allege facts supporting each element of the crime charged. *Courneya*, 132 Wn. App. at 350. These legal and factual requirements are designed to give the defendant adequate notice of the charges so that he or she may prepare a defense. *Courneya*, 132 Wn. App. at 351.

Where a defendant challenges the sufficiency of an information for the first time on appeal, we construe that charging document liberally in favor of validity. *Williams*, 162 Wn.2d at 185. In analyzing the sufficiency of an information under this liberal construction, we employ a two-prong test: (1) do the necessary elements appear in any form, or by fair construction can they be found in the information and, if so, (2) can the defendant show he or she was actually prejudiced by the vague or inartful language. *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012). Under the first prong, we consider the charging document alone, reading it as a whole, construing it "according to common sense," and including facts that are necessarily implied by the document's language. *State v. Goodman*, 150 Wn.2d 774, 788, 83 P.3d 410 (2004) (emphasis omitted) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 109, 812 P.2d 86 (1991)).

2. The information was not challenged below so the Court applies a liberal construction.

The information was not challenged below so the reviewing court applies a liberal construction to determine whether by fair construction all of the elements can be found in the information and then whether the defendant can show she was actually prejudiced by inartful language that caused a lack of notice.

3a. The information contains all the elements.

RCW 46.61.522 provides the following elements:
(1) A person is guilty of vehicular assault if he or she operates or

drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

The information in this case must include that she caused substantial bodily harm to another *and* while operating a motor vehicle (1) in a reckless manner, or (2) while driving under the influence, or (3) with disregard for the safety of others. The information includes all of these elements and provides the linkage necessary to provide notice to Ms. Pritchard.

The information in this case reads:

> On or about the 5th day of October, 2010, in the County of Clallam, State of Washington, the above-named Defendant did cause substantial bodily harm to another, to-wit: Shirley Gene Holman, and did (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug, and/or (3) operate or drive a vehicle with disregard for the safety of others; contrary to Revised Code of Washington 46.61.522(1) (Laws of 2001, ch. 300, § 1). (CP 18).

Ms. Pritchard asserts that word "and" between "above-named

Defendant did cause substantial bodily harm to another, to-wit: Shirley Gene Holman did cause substantial bodily harm to another" and the three alternative means of committing the crime did not provide a causal relationship between the elements. The argument is not correct. The term "and" creates a conjunctive between the elements, linking them to each other. *Guijosa v. Wal-Mart Stores, Inc.* 101 Wn.App. 777, 790-91, 6 P.3d 583 (2000). By linking the substantial bodily harm element to each driving alternative with the conjunctive "and", the information provided adequate notice to Ms. Pritchard. In addition, the information tracks the language of the statute (where "cause substantial bodily injury" is linked to each alternative means by the word "and"). The information contains all the elements.

3b. Reading the complaint in a common sense manner, fairly constructing each element in favor of validity, Ms. Pritchard has actual notice of the crime for which she was charged.

The information shows a direct link between the element of "caused substantial harm" *and* each driving alternative. Even if the connection between the elements is inartful or not a model of clarity, interpreting the complaint liberally in a manner that favors validity shows each element is sufficiently stated to deny Ms. Pritchard's assertion the information is inadequate.

4. Ms. Pritchard cannot show actual prejudice.

The test is whether Ms. Pritchard can show that inartful or vague language actually prejudiced her. The Court may look outside the information to determine if there was actual prejudice. *State v. Harris,* ___ Wn.App. ___, 272 P.3d 299 (2012). Ms. Pritchard has failed to identify any prejudice. Although she challenged assertively each part of the State's evidence at trial, her only complaint about notice related to whether the State had provided adequate notice that it was going to introduce retrograde extrapolation evidence (RP 1/11/2011 62-3). She never indicated in any manner that she did not understand all the elements she faced. There is no actual prejudice.

Issue Two: Did the trial court correctly permit admission of Ms. Pritchard's statements because her responses to the questions of Trooper Ryan "were appropriate as opposed to being incoherent."?

ARGUMENT: THE TESTIMONY OF TROOPER RYAN ESTABLISHED THAT, WHILE SHOWING SIGNS OF INTOXICATION, MS. PRITCHARD ASKED APPROPRIATE QUESTIONS AND MADE APPROPRIATE RESPONSES.

1. Standard of review.

Not every interaction between an officer and a citizen constitutes a seizure. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d

S.Ct. 2382, 115 L.Ed.2d 389 (1991); *United States v. Mendenhall*, 446 U.S. 544, 552-53, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). There are three types of permissible encounters between police officers and citizens: (1) the consensual encounter, which may be initiated without any objective level of suspicion; (2) the investigative detention, which must be supported by a reasonable suspicion of criminal activity if the interaction is nonconsensual; and (3) the arrest, which is valid only if supported by probable cause. The present case involves the first category – a consensual encounter. Ms. Pritchard's question and statements were coherent, responsive, and oriented to time and place.

The trial court's failure to enter written findings after the CrR 3.5 hearing does not require an appellate court to reverse. If a trial court's oral decision sufficiently sets forth its reasons denying a motion to suppress, the appellate court may simply resolve the issue on the record before it. *See, e.g., State v. Riley*, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993); *State v. Smith*, 67 Wn. App. 81, 86-87, 834 P.2d 26 (1992), *aff'd*, 123 Wn.2d 51 (1993).

1. Ms. Pritchard's statements show she was coherent and tracking with the questions asked by Trooper Ryan.

Trooper Ryan testified he was dispatched to the collision at 7:29 p.m. and arrived at the scene at approximately 7:30 p.m. (RP

10/31/2011 103). On cross, he testified he cleared the collision scene at "8:25 or so" and went to the Olympic Medical Center (RP 10/31/2011 121). Ms. Pritchard initiated a conversation with Trooper Ryan, asking "what happened?" (RP 10/31/2011 122). He explained what happened "as best he knew" and then asked her where she had been; she responded that she had been at Traylor's, a local restaurant and bar (RP 10/31/2011 122-23). In response to his question about alcohol, she stated she had consumed 3 drinks, which may have been in addition to the beer she consumed earlier in Beaver (RP 10/31/2011 123). Trooper Ryan asked if she was diabetic because a driver "can look like they are intoxicated" but they may be reacting to their diabetes (RP 10/31/2011 123). She answered she was "pre-diabetic" (RP 10/31/2011 124). She was asked to conduct a voluntary horizontal gaze Nystagmus test and she declined (RP 10/31/2011 124). He left the medical center and returned at some time before 11:26 p.m. to place Ms. Pritchard under arrest for vehicular assault (RP 11/1/2011 26). The record does not reflect any further questioning.

The trial court held each of the statements were admissible and that "her responses were appropriate as opposed to being incoherent" (RP 10/31/11 55-6). Analysis of the statements

supports the trial court. Ms. Pritchard asked the trooper an intelligent question ("what happened?"), which shows she recognized she was speaking to law enforcement. She answered his questions with sufficient detail to show what may have occurred and, very importantly, understood his question about being diabetic well enough to give a nuanced answer ("pre-diabetic"). The record also shows she felt sufficiently free to refuse a sobriety test when she refused to agree to perform a Gaze Nystagmus test. It is reasonable to conclude she did not feel threatened or intimidated when she spoke with Trooper Ryan. The record supports the trial court's decision that Ms. Pritchard's statements were admissible.

2. Ms. Pritchard's argument relies on suppositions not supported by the trial court record.

Ms. Pritchard now attempts to supplement the record with information she did not present at trial. Her counsel below never sought to introduce any information about her medical condition. His only question to the trooper was why was she was immobilized (RP 10/31/2012 37). He then conjectured she "may have suffered a spinal injury or something like that" (RP 10/31/2012 37). On appeal, Ms. Pritchard asserts she was questioned not long after the

accident (Appellant's Brief, page 13). One hour is not right after the accident. She indicates she was receiving medical care (Appellant's Brief, page 13). That is not in the record. She was in a facility to receive medical care, but trial counsel never developed that she was receiving medical care when Trooper Ryan approached her (RP 10/31/2012 36). The record does reflect that she had not received pain medication (RP 10/31/2012 21) but does not say why. The record does not support the assertion she was in sufficient pain to cause the hospital to provide pain medication. Trial counsel did not develop her medical condition between the time she arrived and the time the trooper spoke to her. Trial counsel could have used the testimony of Nurse Tim Peterson to develop her medical symptoms. In short, the record is devoid of any information that Ms. Pritchard was anything but alert and responsive to the trooper's presence.

Issue Three: Did the trial court properly rule Ms. Pritchard's statements were admissible because she was not in a custodial situation?

ARGUMENT: THERE IS NOTHING IN THE RECORD TO SUPPORT THE ASSERTION THAT MS. PRITCHARD WAS SEIZED. SHE WAS ABLE TO BREAK OFF THE ENCOUNTER WHEN SHE WISHED. SHE WAS NOT BEING DETAINED BY TROOPER RYAN BUT INSTEAD FOR MEDICAL ISSUES.

1. Ms. Pritchard was not in custody.

1. Ms. Pritchard was not in custody.

Ms. Pritchard argues her statements should have been excluded because they were the result of custodial interrogation without benefit of *Miranda.*[1] Ms. Pritchard was not in custody as the term is defined in *Miranda.* Being strapped to a backboard in a hospital setting is nowhere near the concept of custodial interrogation envisioned in *Miranda.* Secondly, "not free to leave" is not the entire test envisioned by *Miranda.* Third, Ms. Pritchard was "not free to leave" because of medical issues, not because Trooper Ryan exercised any control over her.

2. A seizure for *Miranda* purposes requires more than that a person may have subjectively believed she was not free to leave.

Ms. Pritchard relies on the United States Supreme Court decision in *J.D.B. v. North Carolina,* ___ S.Ct. ___, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). The entire holding of *J.D.B.* is that the police must consider the age of a juvenile when determining whether a reasonable person would believe they are being interrogated in a custodial situation.

In 2012, the United States Supreme Court issued *Howes v. Fields,* ___ U.S. ___, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012),

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

addressing whether a prison inmate's lack of "freedom of movement" during questioning presented a circumstance that mandated lower courts to decide that the interrogation was custodial. The Court stated: "Not all restraints on freedom of movement amount to custody for purposes of *Miranda.*" *Id.*, at 1189. The Court then explained that:

> "the additional question [is] whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. 'Our cases make clear...that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." (citation omitted)

Id., at 1190. Therefore, "not free to leave" is insufficient to demonstrated a custodial situation.

The Court then pointed out that *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), held that roadside questioning was not custodial, even though most motorists would not feel free to "leave the scene of a traffic stop without being told they might do so." *Id.*, at 1190, *Bekermer v. McCarty, supra,* at 436-7. But, the Court determined in *Berkemer* the "temporary and relatively nonthreatening detention involved in a traffic stop or *Terry*[3] stop does not constitute *Miranda* custody. "

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Id., at 1190, *Bekermer v. McCarty, supra,* at 436-7. Therefore, even though a reasonable person may not feel free to leave, that is only a small part of the analysis. The larger question is whether the situation contains inherently coercive pressures as the type of station house questioning at issue in *Miranda.* A hospital emergency room, in and of itself, cannot remotely compare to "coercive pressures" inherent in "station house questioning." *Howes v. Fields, supra*, 132 S.Ct. 1990.

Howes v. Fields, supra, stated a situation may become custodial if a person is cut off from his normal life and companions and abruptly transported from the street into a "police-dominated atmosphere, *Miranda,* 384 U.S., at 456, 86 S.Ct. 1602." *Howes v. Fields, supra,* at 1190. Ms. Pritchard was in the hospital emergency room because she was injured in a collision she created; the environment was caused by the collision she initiated, not by police methods or tactics. She was removed from normal life and companions by her actions, not by the trooper.

A person is seized if, when in an objective view of all the circumstances, a reasonable person would not have felt free to leave, decline to answer questions, or terminate the encounter with

police. *United State v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). The test also includes whether the person being questioned felt compelled or threatened to answer. An encounter may lose its consensual nature and become a seizure if "the officer, by means of physical force or show of authority, has in some manner restrained the citizen's freedom to cut off the contact." *Terry v. Ohio,* 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004), quoting from *Thompson v. Keohane,* 516 U.S. 99, 112,116 S.Ct. 457, 133 L.Ed.2d 383 (1995) set out two discrete inquiries: What were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to *terminate the interrogation* and leave. In other words, even if leaving is not an option, a person is still not in a custodial interrogation if he or she can say, "I don't want to talk to you" to the police officer. *See, e.g., Florida v. Bostick,* 501 U.S. 429, 436, 111 S.Ct. 2383, 115 L.Ed.2d 389 (1991) ("Here, for example, the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that

was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.").

The Washington Constitution, article I, section 7,[4] provides greater protection to individual privacy rights than the Fourth Amendment.[5] *Rankin*, 151 Wn.2d at 694. Under article I, section 7, a seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). *See also Rankin*, 151 Wn.2d at 695; *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). In Ms. Pritchard's situation, she was not free to go because she was receiving medical attention, but she freely asserted her right to cut off any further cooperation with the trooper

[4] The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7

[5] The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend IV.

when she refused to permit the Gaze Nystagmus test. She was released from the hospital when her medical care was completed, not when the State Patrol ordered it.

3. That Ms. Pritchard was strapped to a backboard is not part of the test to show a "seizure."

The Washington Supreme Court has embraced a nonexclusive list of police actions that will likely turn a consensual encounter into a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Harrington*, 167 Wn.2d at 664 (citing *Mendenhall*, 446 U.S. at 554-55; *Young*, 135 Wn.2d at 512). Additionally, where the encounter takes place is another factor, but it is not dispositive. *Bostick*, 501 U.S. at 437. In the absence of any such evidence, an otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. *Harrington*, 167 Wn.2d at 664. The defense bears the burden of proving a seizure occurred in violation of article I, section 7. *Harrington*, 167 Wn.2d at 664; *O'Neill*, 148 Wn.2d at 574; *Young*, 135 Wn.2d at 510.

Ms. Pritchard was not seized by Trooper Ryan. She was in the emergency room, strapped to a backboard, because she had caused a collision. She was never detained by Trooper Ryan; the record reflects that she was permitted to leave when medical procedures were completed. There is no evidence that Trooper Ryan did anything that would have "seized" Ms. Pritchard. On the other hand, Ms. Pritchard terminated the encounter when she refused to permit any field sobriety tests. The contact was not initiated or controlled by Trooper Ryan.

4. The trial court erred when it stated it was a "close call" about whether the questioning was custodial.

The trial court erred when it indicated it was a "close call" because the trooper asked questions, even though he was pretty sure she was intoxicated (RP 10/31/2012 56). *State v. Lorenz, supra,* at page 37, held exactly the opposite:

> Lorenz argues that following *State v. Dictado,* 102 Wn.2d 277, 687 P.2d 172 (1984), we should hold that she was under custodial interrogation at the time the written statement was made because the police had developed probable cause to arrest her for the crimes she was later charged, and had not properly given her *Miranda* warnings. However, this court explicitly rejected the *Dictado* approach in *State v. Harris[,* 106 Wn.2d 784, 725 P.2d 975 (1986)] when this court adopted the U.S. Supreme Court's approach in *Berkemer. Harris,* 106 Wn.2d at 789–90, 725 P.2d 975; *State v. Short,* 113 Wn.2d 35, 41, 775 P.2d 458 (1989). It is irrelevant whether the officer's unstated plan was to take

> Lorenz into custody or that Lorenz was the focus of the police investigation. *Beckwith v. United States,* 425 U.S. 341, 347, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). It is irrelevant whether Lorenz was in a coercive environment at the time of the interview. *[State v. Sargent,* 111 Wn.2d 641], 649, 762 P.2d 1127 [(1988)]. Thus it is, as the State contends, irrelevant whether the police had probable cause to arrest Lorenz (before or during the interview). *Berkemer,* 468 U.S. at 442, 104 S.Ct. 3138.

The trial court overlooked that the contact was precisely the sort of contact addressed in *Berkemer.* The same sort of contact occurs daily in every state in the United States. Law enforcement asks questions to determine whether a person is intoxicated, even if the officer has some indications the person may be affected. The driver is not free to leave until the officer finishes the discussion or the driver refuses to answer any further questions. Viewing the record in an objective manner, there is nothing to support the trial court's opinion that it was a close call whether the trooper should have provided *Miranda* warnings to Ms. Pritchard.

Issue Three: Did the trial court correctly determine the State had established a sufficient foundation to admit the results of a blood analysis even though no one could prove that the tube contained sodium fluoride and potassium oxalate?

ARGUMENT: EVEN IF THE CERTIFICATE OF COMPLIANCE WAS AVAILABLE, IT WOULD NOT ANSWER WHAT CHEMICALS WERE IN THE TUBES. THE COURT CORRECTLY DETERMINED THAT THE STATE HAD ESTABLISHED THE TUBES CONTAINED AN ANTICOAGULANT AND AN ENZYME POISON.

1. Standard of Review.

Sufficiency of the evidence:

> The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin,* 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff,* 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385, 622 P.2d 1240 (1980).

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The record contains substantial evidence to permit any rational trier of fact to find the blood samples contained the appropriate coagulant and enzyme poison.

Ms. Pritchard argued below that the toxicologist Rebecca Flaherty's failure to bring the certificate of compliance for the gray top tubes dictated the State had not proved the tubes contained an enzyme poison and an anticoagulant (RP 11/1/2011 89-91). Ms. Flaherty improperly agreed there is no way of knowing whether the enzyme poison was added without the "lot number" (certificate of compliance) (RP 11/1/2011 96). The lot number and the certificate of compliance would *not* have shown the tubes contained a

substance "sufficient in amount to prevent clotting and stabilize the alcohol concentration." WAC 448-14-020 (3)(b). It would only prove that someone *said* the tubes contained the required anticoagulant and enzyme poison.

WAC 448-14-020 (3) reads:

> (3) Sample container and preservative.
>
> (a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper will be used.
>
> (b) Blood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

Section (b) only requires that the tube contain an anticoagulant and an enzyme poison sufficient to prevent clotting and to stabilize the alcohol concentration. Proof that the blood was not coagulated and that the lab could determine the alcohol concentration was all that is legally required. The State is not required to prove the tube contained sodium fluoride and potassium oxalate.

Lynn Mawbrey testified she drew the blood referenced to Ms. Pritchard into gray top tubes (RP 11/1/2011 40). She testified that she labeled the tubes and they were given to the trooper (RP

11/1/2011 41). Toxicologist Rebecca Flaherty testified she received the same gray top tubes (RP 11/1/2011 73). She testified she knew the tubes contained an anticoagulant because the tubes are gray topped tubes that are provided to law enforcement agencies throughout the state (RP 11/1/2011 75). She stated "the gray top is regulated by the FDA to contain both an enzyme poison and anticoagulant" (RP 11/1/2011 75). She testified the chemicals inside are sodium fluoride and potassium oxalate (RP 11/1/2011 75). On cross, she testified the tubes are regulated to contain the enzyme poison and the anticoagulant (RP 11/1/2011 89). She was then asked "And you don't know what was in the tubes prior to them being filled with blood?" She replied the certificate of compliance from the company that the lab purchased the tubes from would prove the tubes contain the enzyme poison and the anticoagulant (RP 11/1/2011 89). Trial counsel then asked if she just assumed what was in the tube "[e]ven though there's a way you could verify what's actually in there?" and "you wouldn't know what the powder was unless you compared the lot number to the certificate of compliance?" (RP 11/1/2011 90). She answered:

> Well, except for the fact that it's a gray top tube and the gray top tube is regulated to contain the sodium

> fluoride and potassium oxygen [sic oxalate] (RP 11/1/2011 90).

The next question was about "the proportion" of the chemicals (RP 11/1/2011 91). On redirect, Ms. Flaherty testified the proportion – concentration – of the chemicals was verified against the Tox Lab's in house prepared calibrators (RP 11/1/2011 93) She also testified the gray top tubes have the appropriate amount of anticoagulant and enzyme poison (RP 11/1/2011 95). Finally, she testified that, if an anticoagulant was not present, the blood would "basically appear almost solid and would not be able to appear [sic] tested) (RP 11/1/2011 96). She then stated the blood was liquid when she tested it; if the blood had appeared clotted, that would be noted (RP 11/1/2011 95).

The toxicologist's regulations require the blood to be preserved with an anticoagulant and an enzyme poison to "prevent clotting and stabilize the alcohol concentration." WAC 448-14-020 (3)(b). The toxicologist's testimony was the blood was not clotted. Her testimony also indicated the alcohol concentration could be determined through the appropriate testing procedures. She also testified that the fact that the tube had a gray top was, in itself,

proof that the tube contained the FDA required amount of anticoagulant and enzyme poison.

Looking at the evidence in a light most favorable to the State, it is very clear the evidence supports the State's argument that the blood was properly preserved. It did not clot and was stable for testing. Moreover, the State presented three forms of business practices: First, the FDA control of gray top tubes. Second, the state's control and distribution of gray top tubes. Third, that the procedure utilized in the present case met all the standard practices of the Washington Toxicology Laboratory. The record is sufficient to show the blood test results were admissible.

3. If admission of the blood test results was error, the error was harmless because substantial evidence supported each of the other two alternative ways of committing vehicular assault.

Ms. Pritchard was charged, and the jury was instructed, about three alternative means by which the State could prove vehicular assault. There is substantial evidence to support both of the other alternatives. *State v. Ortega-Martinez,* 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994)(" If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a

conviction because we infer that the jury rested its decision on a unanimous finding as to the means") (emphasis in original).

Lon Holman, the driver of the vehicle that contained the victim (RP 10/31/2011 64), testified that he was traveling west on Highway 101 toward Port Angeles (RP 10/31/2011 65). The weather was "sunny and nice," roadway dry, traffic "light to moderate" (RP 10/31/2011 65). Mr. Holman saw a black SUV coming in the opposite direction, in the left hand turn lane (RP 10/31/2011 66). Everything looked normal, but "it just kept coming right out in front of me" into his lane of travel (RP 10/31/2011 67). He hit the brakes and swerved to the right, but there was no way to avoid the impact (RP 10/31/2011 67).

Mary Robuck was driving westbound on Highway 101 and was driving in the outer lane when she witnessed a wreck (RP 11-1-11 49-50). She saw a black vehicle that was going too fast to make the curve and shot over the road (RP 11/1/11 52). The vehicle hit the very sharp edge of the ditch and bound [sic] up, becoming airborne, landing in the left lane (RP 11/1/11 52). The white car didn't have a chance to move (RP 11/1/11 53). The black car entered her lane but she was able to stop before hitting the vehicle (RP 11/1/11 53).

John Beckstrom testified he was headed east on Highway 101, to look at a horse trailer on the "old highway" (RP 11/1/11 116). He observed a green SUV in the fast lane that was driving a little erratically (RP 11/1/11 117). He got behind the vehicle because he, too, was going to turn left, but as they approached the left turn, it was clear the SUV was not slowing down; in fact, his wife pulled out her cell phone to begin calling 911 because it didn't look good (RP 11/1/11 117). The SUV was traveling way to fast to make the left hand turn, went down into the ditch, took out the yield sign, bounced back up on the highway in front of a white sedan and was struck (RP 11/1/11 117-18).

The jury was instructed that reckless driving meant "[t]o operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences." It was also instructed that "[d]isregard for the safety of others means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence." Instruction number 11, CP 43.

The evidence clearly shows she attempted to make a left turn into ongoing traffic while traveling at an unsafe speed. Her speed was so fast she shot across one lane of traffic and was

struck broadside by Len Holman, causing serious and permanent bodily injury to Shirley Jean Holman, his mother (RP 10-31-11 62, 97). The conduct was so blatantly obvious, one of the testifying witness' wife was already calling 911 because they could see what was going to happen, even before it happened. The evidence clearly shows she acted in an aggravated negligent manner, too. It would have been negligent to approach the yield sign at any speed too fast to stop her vehicle. To approach the yield sign at full speed so it was impossible to yield before entering into oncoming traffic, if not reckless, is aggravated negligence.

There is substantial evidence from which any rational juror could have found the essential elements of each alternative beyond a reasonable doubt. *Coleman v. Johnson,* No 11-1053 (May 29, 2012). The U.S. Supreme Court restated the test:

> Under *Jackson,*[6] evidence is sufficient to support a conviction if, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' 443 U.S., at 319. (emphasis in original).

Jackson stated at 443 U.S 318-9, 99 S.Ct. 2788-9:

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[6] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Jackson v. Virginia* was adopted in Washington State in *State v. Green,* 94 Wn.2d 216, 616 P.2d 628 (1980) (*Green* II).

> After *Winship*[7] the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby v. INS*, 385 U.S., at 282, 87 S.Ct., at 486 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (footnote omitted).

In this case, the facts are all there for a jury to decide Ms. Pritchard was guilty of Vehicular Assault under any one or all three alternatives.

Issue Four: Did the trial court properly admit information from Ms. Pritchard's hospital chart when it held the information was not protected by the nurse-patient privilege or HIPPA?

ARGUMENT: RCW 70.02.050 (k) CONTROLS OVER RCW 5.62.020 BECAUSE IT IS SPECIFIC. RCW 70.02.050 WAS AMENDED IN 2005 TO BRING IT INTO COMPLIANCE WITH HIPAA. THE LANGUAGE OF RCW 70.02.050 TRACKS HIPAA LANGUAGE IN 45 CFR 164.512.

1. Standard of Review.

> The appellate court reviews the trial court's interpretation of the privilege statute *de novo*. *Drewett v. Rainier Sch.*, 60 Wn.App. 728, 730, 806 P.2d 1260, *review denied*, 117 Wn.2d 1003, 815 P.2d 266 (1991).

State v. Vietz, 94 Wn.App. 870, 872, 973 P.2d 501 (1999)

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[7] 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

2. RCW 70.02.050 (k) controls.

RCW 5.62.020 reads:

> No registered nurse providing primary care or practicing under protocols, whether or not the physical presence or direct supervision of a physician is required, may be examined in a civil or criminal action as to any information acquired in attending a patient in the registered nurse's professional capacity, if the information was necessary to enable the registered nurse to act in that capacity for the patient, unless:
>
> (1) The patient consents to disclosure or, in the event of death or disability of the patient, his or her personal representative, heir, beneficiary, or devisee consents to disclosure; or
>
> (2) The information relates to the contemplation or execution of a crime in the future, or relates to the neglect or the sexual or physical abuse of a child, or of a vulnerable adult as defined in RCW 74.34.020, or to a person subject to proceedings under chapter 70.96A, 71.05, or 71.34 RCW.

Pursuant to RCW 5.62.020, disclosure of nursing information is very limited except by consent. RCW 70.02.050, however, permits wider disclosure without consent. It reads:

> (1) A health care provider or health care facility may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:
>
> ...
>
> (k) To fire, police, sheriff, or another public authority, that brought, or caused to be brought, the patient to the health care facility or health care provider if the disclosure is limited to the patient's name, residence, sex, age, occupation,

> condition, diagnosis, estimated or actual discharge date, or extent and location of injuries as determined by a physician, and whether the patient was conscious when admitted;...

Pursuant to RCW 70.02.050 (k), there was no error in admitting the testimony of the registered nurse. There is a conflict between the two statutes. This appears to be a question of first impression in Washington State.

a. Standard of review of conflicting statutes.

> When two statutes conflict, the reviewing court attempts to harmonize statutory provisions in relation to each other and interpret a statute to give effect to all statutory language. [*King County v. Cent. Puget Sound] Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560m 14 P.3d 133 [(2000)]. We avoid construing a statute in a manner that results in "unlikely, absurd, or strained consequences." *Glaubach [v. Regency Blue Shield,* 149 Wn.2d 827, 833, 74 P.3d 115 [(2003)], When statutes conflict, specific statutes control over general ones. *Hallauer v. Spectrum Props., Inc.,* 143 Wn.2d 126, 146–47, 18 P.3d 540 (2001).

Mason v. Georgia-Pacific Corp., 166 Wn.App. 859, 870, 271 P.3d 381 (2012).

b. RCW 5.62.020 is a general statute. RCW 70.02.050 (k) is a specific statute.

RCW 5.62.020 is the general statute because it generally restricts information known by a registered nurse. RCW 70.02.050 (k) is the specific statute because it defines under what situations medical evidence can be released and what medical evidence may

be released. RCW 70.02.050 (k) controls.

c. RCW 70.02.050 (k) permits the testimony provided by Registered Nurse Tim Peterson.

Registered Nurse Tim Peterson testified Ms. Pritchard was admitted at 8:00 p.m. on July 1, 2005 and discharged at 12:10 a.m. (RP 11/1/2011 19-20). He also testified she did not receive any fluids or medication prior to the legal blood draw (RP 11/1/2011 19-21).

These two questions fit within RCW 70.02.050 (k). Question number one related to Ms. Pritchard's estimated or actual discharge date. Question number two (fluids or medication) to her condition. Ms. Pritchard was brought in by ambulance, a recognized public entity. There is no error under Washington law in admitting these two pieces of information.

d. RCW 70.02.050 (k) was passed in 2005 to bring state Medical Records Disclosure laws into conformity with HIPA.

In 2005, the Legislature amended RCW 70.02 *et.seq.* to make state medical disclosure laws consistent with the Health Insurance Portability and Accountability Act (HIPAA). Section (k) was added because HIPAA permitted disclosure of medical information to law enforcement under the terms set forth in section (k) and (l). These two sections correspond directly with 45 CFR

164.512 (e) and (f) (Attached as Appendix A).

e. The admitted information also complies with HIPAA regulation 45 C.F.R. 164.512 (e) and (f).

Subsection (e) permits disclosure (i) in response to an order of a court or an administrative tribunal and (ii) in response to a subpoena, discovery request or other lawful process, if notice has been given and the parties agree to a qualified protective order (or doesn't respond), all of which occurred in this case (RP 11/1/2011 17-18). The covered person requested a protective order, to which the State assented. The information was admissible under HIPAA.

f. If the question about "fluids or medications" exceeded the scope of RCW 70.02.050 (k), it is harmless error.

RCW 70.02.05 (k) clearly supports the question about when Ms. Pritchard was admitted and discharged. The second question. about whether she had been given any fluids or medication, should also be admissible as information about her condition. If it is not, it can be struck as harmless error. Fluids would not show up in the blood analysis, in any event. Medications would show up in the blood draw, if the body had absorbed them, and would be readily dealt with by the Trial Deputy. Medications would not interfere with retrograde analysis unless the drug contained ethanol (drinking

alcohol is ethanol), which would be highly unlikely (RP 11/1/2011 95).

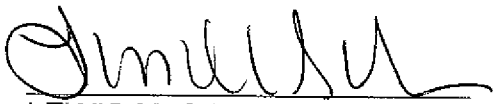
VI. Conclusion

There were no errors in Ms. Pritchard's trial. The information contained all the essential elements necessary to give notice and the record does not show any issues about notice of the elements arising in trial. The interview was never remotely a "custodial interrogation." If anything, it was exactly the same factual scenario posited in *Berkemer* – a person suspected of drunk driving was being asked questions. Ms. Pritchard showed she understood what was happening and understood she had a right to end the discussion, because she initiated the discussion and then refused to submit to a field sobriety test. The testimony from Nurse Tim Peterson was admissible under a Washington statute that had been modified to comply with HIPAA, so there was no error in admitting his testimony. The testimony about the blood coagulant and enzyme poison showed that the blood drawer, the WSP Trooper Ryan, and the Toxicologist reasonably relied on the grey top tubes to contain the appropriate chemicals in the appropriate amounts. In addition, testimony that the blood was not coagulated and could be tested showed the presence of the two ingredients required by the

Toxicologist. Finally, there was sufficient evidence to convict Ms. Pritchard under any one of the three alternative ways to commit this crime. This court should affirm the conviction in all respects.

Respectfully submitted this 29 day of June, 2012.

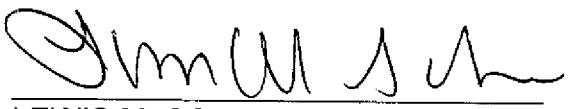
DEBORAH KELLY, Prosecutor,



LEWIS M. SCHRAWYER, #12202
Deputy Prosecuting Attorney
Clallam County

CERTIFICATE OF DELIVERY

LEWIS M. SCHRAWYER, under penalty of perjury under the laws of the State of Washington, does swear or affirm that a copy of this Response Brief, including Attachment A, was sent to Backlund and Mistry by email through the Washington State Court Notification process on June 29, 2012.



LEWIS M. SCHRAWYER

APPENDIX A

(ii) Provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or

(iii) Reasonably infers from the circumstances, based the exercise of professional judgment, that the individual does not object to the disclosure.

(3) *Limited uses and disclosures when the individual is not present.* If the individual is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care. A covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information.

(4) *Use and disclosures for disaster relief purposes.* A covered entity may use or disclose protected health information to a public or private entity authorized by law or by its charter to assist in disaster relief efforts, for the purpose of coordinating with such entities the uses or disclosures permitted by paragraph (b)(1)(ii) of this section. The requirements in paragraphs (b)(2) and (3) of this section apply to such uses and disclosure to the extent that the covered entity, in the exercise of professional judgment, determines that the requirements do not interfere with the ability to respond to the emergency circumstances.

[65 FR 82802, Dec. 28, 2000, as amended at 67 FR 53270, Aug. 14, 2002]

§ 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in §164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) *Standard: Uses and disclosures required by law.* (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

(b) *Standard: uses and disclosures for public health activities.*—(1) *Permitted disclosures.* A covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;

(ii) A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect;

(iii) A person subject to the jurisdiction of the Food and Drug Administration (FDA) with respect to an FDA-regulated product or activity for which that person has responsibility, for the purpose of activities related to the quality, safety or effectiveness of such FDA-regulated product or activity. Such purposes include:

(A) To collect or report adverse events (or similar activities with respect to food or dietary supplements), product defects or problems (including problems with the use or labeling of a product), or biological product deviations;

(B) To track FDA-regulated products;

(C) To enable product recalls, repairs, or replacement, or lookback (including locating and notifying individuals who have received products that have been recalled, withdrawn, or are the subject of lookback); or

(D) To conduct post marketing surveillance;

(iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation; or

(v) An employer, about an individual who is a member of the workforce of the employer, if:

(A) The covered entity is a covered health care provider who is a member of the workforce of such employer or who provides health care to the individual at the request of the employer:

(*1*) To conduct an evaluation relating to medical surveillance of the workplace; or

(*2*) To evaluate whether the individual has a work-related illness or injury;

(B) The protected health information that is disclosed consists of findings concerning a work-related illness or injury or a workplace-related medical surveillance;

(C) The employer needs such findings in order to comply with its obligations, under 29 CFR parts 1904 through 1928, 30 CFR parts 50 through 90, or under state law having a similar purpose, to record such illness or injury or to carry out responsibilities for workplace medical surveillance; and

(D) The covered health care provider provides written notice to the individual that protected health information relating to the medical surveillance of the workplace and work-related illnesses and injuries is disclosed to the employer:

(*1*) By giving a copy of the notice to the individual at the time the health care is provided; or

(*2*) If the health care is provided on the work site of the employer, by posting the notice in a prominent place at the location where the health care is provided.

(2) *Permitted uses.* If the covered entity also is a public health authority, the covered entity is permitted to use protected health information in all cases in which it is permitted to disclose such information for public health activities under paragraph (b)(1) of this section.

(c) *Standard: Disclosures about victims of abuse, neglect or domestic violence*—(1) *Permitted disclosures.* Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:

(i) To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;

(ii) If the individual agrees to the disclosure; or

(iii) To the extent the disclosure is expressly authorized by statute or regulation and:

(A) The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or

(B) If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

(2) *Informing the individual.* A covered entity that makes a disclosure permitted by paragraph (c)(1) of this section must promptly inform the individual that such a report has been or will be made, except if:

(i) The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or

(ii) The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(d) *Standard: Uses and disclosures for health oversight activities*—(1) *Permitted disclosures.* A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility;

(iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.

(2) *Exception to health oversight activities.* For the purpose of the disclosures permitted by paragraph (d)(1) of this section, a health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to:

(i) The receipt of health care;

(ii) A claim for public benefits related to health; or

(iii) Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.

(3) *Joint activities or investigations.* Nothwithstanding paragraph (d)(2) of this section, if a health oversight activity or investigation is conducted in conjunction with an oversight activity or investigation relating to a claim for public benefits not related to health, the joint activity or investigation is considered a health oversight activity for purposes of paragraph (d) of this section.

(4) *Permitted uses.* If a covered entity also is a health oversight agency, the covered entity may use protected health information for health oversight activities as permitted by paragraph (d) of this section.

(e) *Standard: Disclosures for judicial and administrative proceedings*—(1) *Permitted disclosures.* A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health

information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(*1*) No objections were filed; or

(*2*) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Nothwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

(2) *Other uses and disclosures under this section.* The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

(f) *Standard: Disclosures for law enforcement purposes.* A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) *Permitted disclosures: Pursuant to process and as otherwise required by law.* A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(*1*) The information sought is relevant and material to a legitimate law enforcement inquiry;

(*2*) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

(2) *Permitted disclosures: Limited information for identification and location purposes.* Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

(i) The covered entity may disclose only the following information:

(A) Name and address;

(B) Date and place of birth;

(C) Social security number;

(D) ABO blood type and rh factor;

(E) Type of injury;

(F) Date and time of treatment;

(G) Date and time of death, if applicable; and

(H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

(ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

(3) *Permitted disclosure: Victims of a crime.* Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime, other than disclosures that are subject to paragraph (b) or (c) of this section, if:

(i) The individual agrees to the disclosure; or

(ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) *Permitted disclosure: Decedents.* A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

(5) *Permitted disclosure: Crime on premises.* A covered entity may disclose to a law enforcement official protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

(6) *Permitted disclosure: Reporting crime in emergencies.* (i) A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to:

(A) The commission and nature of a crime;

(B) The location of such crime or of the victim(s) of such crime; and

(C) The identity, description, and location of the perpetrator of such crime.

(ii) If a covered health care provider believes that the medical emergency described in paragraph (f)(6)(i) of this section is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care, paragraph (f)(6)(i) of this section does not apply and any disclosure to a law enforcement official for law enforcement

purposes is subject to paragraph (c) of this section.

(g) *Standard: Uses and disclosures about decedents*—(1) *Coroners and medical examiners.* A covered entity may disclose protected health information to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. A covered entity that also performs the duties of a coroner or medical examiner may use protected health information for the purposes described in this paragraph.

(2) *Funeral directors.* A covered entity may disclose protected health information to funeral directors, consistent with applicable law, as necessary to carry out their duties with respect to the decedent. If necessary for funeral directors to carry out their duties, the covered entity may disclose the protected health information prior to, and in reasonable anticipation of, the individual's death.

(h) *Standard: Uses and disclosures for cadaveric organ, eye or tissue donation purposes.* A covered entity may use or disclose protected health information to organ procurement organizations or other entities engaged in the procurement, banking, or transplantation of cadaveric organs, eyes, or tissue for the purpose of facilitating organ, eye or tissue donation and transplantation.

(i) *Standard: Uses and disclosures for research purposes*—(1) *Permitted uses and disclosures.* A covered entity may use or disclose protected health information for research, regardless of the source of funding of the research, provided that:

(i) *Board approval of a waiver of authorization.* The covered entity obtains documentation that an alteration to or waiver, in whole or in part, of the individual authorization required by §164.508 for use or disclosure of protected health information has been approved by either:

(A) An Institutional Review Board (IRB), established in accordance with 7 CFR 1c.107, 10 CFR 745.107, 14 CFR 1230.107, 15 CFR 27.107, 16 CFR 1028.107, 21 CFR 56.107, 22 CFR 225.107, 24 CFR 60.107, 28 CFR 46.107, 32 CFR 219.107, 34 CFR 97.107, 38 CFR 16.107, 40 CFR 26.107, 45 CFR 46.107, 45 CFR 690.107, or 49 CFR 11.107; or

(B) A privacy board that:

(*1*) Has members with varying backgrounds and appropriate professional competency as necessary to review the effect of the research protocol on the individual's privacy rights and related interests;

(*2*) Includes at least one member who is not affiliated with the covered entity, not affiliated with any entity conducting or sponsoring the research, and not related to any person who is affiliated with any of such entities; and

(*3*) Does not have any member participating in a review of any project in which the member has a conflict of interest.

(ii) *Reviews preparatory to research.* The covered entity obtains from the researcher representations that:

(A) Use or disclosure is sought solely to review protected health information as necessary to prepare a research protocol or for similar purposes preparatory to research;

(B) No protected health information is to be removed from the covered entity by the researcher in the course of the review; and

(C) The protected health information for which use or access is sought is necessary for the research purposes.

(iii) *Research on decedent's information.* The covered entity obtains from the researcher:

(A) Representation that the use or disclosure sought is solely for research on the protected health information of decedents;

(B) Documentation, at the request of the covered entity, of the death of such individuals; and

(C) Representation that the protected health information for which use or disclosure is sought is necessary for the research purposes.

(2) *Documentation of waiver approval.* For a use or disclosure to be permitted based on documentation of approval of an alteration or waiver, under paragraph (i)(1)(i) of this section, the documentation must include all of the following:

(i) *Identification and date of action.* A statement identifying the IRB or privacy board and the date on which the alteration or waiver of authorization was approved;

(ii) *Waiver criteria.* A statement that the IRB or privacy board has determined that the alteration or waiver, in whole or in part, of authorization satisfies the following criteria:

(A) The use or disclosure of protected health information involves no more than a minimal risk to the privacy of individuals, based on, at least, the presence of the following elements;

(*1*) An adequate plan to protect the identifiers from improper use and disclosure;

(*2*) An adequate plan to destroy the identifiers at the earliest opportunity consistent with conduct of the research, unless there is a health or research justification for retaining the identifiers or such retention is otherwise required by law; and

(*3*) Adequate written assurances that the protected health information will not be reused or disclosed to any other person or entity, except as required by law, for authorized oversight of the research study, or for other research for which the use or disclosure of protected health information would be permitted by this subpart;

(B) The research could not practicably be conducted without the waiver or alteration; and

(C) The research could not practicably be conducted without access to and use of the protected health information.

(iii) *Protected health information needed.* A brief description of the protected health information for which use or access has been determined to be necessary by the IRB or privacy board has determined, pursuant to paragraph (i)(2)(ii)(C) of this section;

(iv) *Review and approval procedures.* A statement that the alteration or waiver of authorization has been reviewed and approved under either normal or expedited review procedures, as follows:

(A) An IRB must follow the requirements of the Common Rule, including the normal review procedures (7 CFR 1c.108(b), 10 CFR 745.108(b), 14 CFR 1230.108(b), 15 CFR 27.108(b), 16 CFR 1028.108(b), 21 CFR 56.108(b), 22 CFR 225.108(b), 24 CFR 60.108(b), 28 CFR 46.108(b), 32 CFR 219.108(b), 34 CFR 97.108(b), 38 CFR 16.108(b), 40 CFR 26.108(b), 45 CFR 46.108(b), 45 CFR 690.108(b), or 49 CFR 11.108(b)) or the expedited review procedures (7 CFR 1c.110, 10 CFR 745.110, 14 CFR 1230.110, 15 CFR 27.110, 16 CFR 1028.110, 21 CFR 56.110, 22 CFR 225.110, 24 CFR 60.110, 28 CFR 46.110, 32 CFR 219.110, 34 CFR 97.110, 38 CFR 16.110, 40 CFR 26.110, 45 CFR 46.110, 45 CFR 690.110, or 49 CFR 11.110);

(B) A privacy board must review the proposed research at convened meetings at which a majority of the privacy board members are present, including at least one member who satisfies the criterion stated in paragraph (i)(1)(i)(B)(2) of this section, and the alteration or waiver of authorization must be approved by the majority of the privacy board members present at the meeting, unless the privacy board elects to use an expedited review procedure in accordance with paragraph (i)(2)(iv)(C) of this section;

(C) A privacy board may use an expedited review procedure if the research involves no more than minimal risk to the privacy of the individuals who are the subject of the protected health information for which use or disclosure is being sought. If the privacy board elects to use an expedited review procedure, the review and approval of the alteration or waiver of authorization may be carried out by the chair of the privacy board, or by one or more members of the privacy board as designated by the chair; and

(v) *Required signature.* The documentation of the alteration or waiver of authorization must be signed by the chair or other member, as designated by the chair, of the IRB or the privacy board, as applicable.

(j) *Standard: Uses and disclosures to avert a serious threat to health or safety*—(1) *Permitted disclosures.* A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

(i)(A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

(B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or

(ii) Is necessary for law enforcement authorities to identify or apprehend an individual:

(A) Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or

(B) Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody, as those terms are defined in § 164.501.

(2) *Use or disclosure not permitted.* A use or disclosure pursuant to paragraph (j)(1)(ii)(A) of this section may not be made if the information described in paragraph (j)(1)(ii)(A) of this section is learned by the covered entity:

(i) In the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure under paragraph (j)(1)(ii)(A) of this section, or counseling or therapy; or

(ii) Through a request by the individual to initiate or to be referred for the treatment, counseling, or therapy described in paragraph (j)(2)(i) of this section.

(3) *Limit on information that may be disclosed.* A disclosure made pursuant to paragraph (j)(1)(ii)(A) of this section shall contain only the statement described in paragraph (j)(1)(ii)(A) of this section and the protected health information described in paragraph (f)(2)(i) of this section.

(4) *Presumption of good faith belief.* A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) or (ii) of this section, if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

(k) *Standard: Uses and disclosures for specialized government functions*—(1) *Military and veterans activities*—(i) *Armed Forces personnel.* A covered entity may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission, if the appropriate military authority has published by notice in the FEDERAL REGISTER the following information:

(A) Appropriate military command authorities; and

(B) The purposes for which the protected health information may be used or disclosed.

(ii) *Separation or discharge from military service.* A covered entity that is a component of the Departments of Defense or Transportation may disclose to the Department of Veterans Affairs (DVA) the protected health information of an individual who is a member of the Armed Forces upon the separation or discharge of the individual from military service for the purpose of a determination by DVA of the individual's eligibility for or entitlement to benefits under laws administered by the Secretary of Veterans Affairs.

(iii) *Veterans.* A covered entity that is a component of the Department of Veterans Affairs may use and disclose protected health information to components of the Department that determine eligibility for or entitlement to, or that provide, benefits under the laws administered by the Secretary of Veterans Affairs.

(iv) *Foreign military personnel.* A covered entity may use and disclose the protected health information of individuals who are foreign military personnel to their appropriate foreign military authority for the same purposes for which uses and disclosures are permitted for Armed Forces personnel under the notice published in the FEDERAL REGISTER pursuant to paragraph (k)(1)(i) of this section.

(2) *National security and intelligence activities.* A covered entity may disclose protected health information to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities authorized by the National Security Act (50 U.S.C. 401, *et seq.*) and implementing authority (*e.g.*, Executive Order 12333).

(3) *Protective services for the President and others.* A covered entity may disclose protected health information to

authorized federal officials for the provision of protective services to the President or other persons authorized by 18 U.S.C. 3056, or to foreign heads of state or other persons authorized by 22 U.S.C. 2709(a)(3), or to for the conduct of investigations authorized by 18 U.S.C. 871 and 879.

(4) *Medical suitability determinations.* A covered entity that is a component of the Department of State may use protected health information to make medical suitability determinations and may disclose whether or not the individual was determined to be medically suitable to the officials in the Department of State who need access to such information for the following purposes:

(i) For the purpose of a required security clearance conducted pursuant to Executive Orders 10450 and 12698;

(ii) As necessary to determine worldwide availability or availability for mandatory service abroad under sections 101(a)(4) and 504 of the Foreign Service Act; or

(iii) For a family to accompany a Foreign Service member abroad, consistent with section 101(b)(5) and 904 of the Foreign Service Act.

(5) *Correctional institutions and other law enforcement custodial situations.* (i) *Permitted disclosures.* A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual protected health information about such inmate or individual, if the correctional institution or such law enforcement official represents that such protected health information is necessary for:

(A) The provision of health care to such individuals;

(B) The health and safety of such individual or other inmates;

(C) The health and safety of the officers or employees of or others at the correctional institution;

(D) The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another;

(E) Law enforcement on the premises of the correctional institution; and

(F) The administration and maintenance of the safety, security, and good order of the correctional institution.

(ii) *Permitted uses.* A covered entity that is a correctional institution may use protected health information of individuals who are inmates for any purpose for which such protected health information may be disclosed.

(iii) *No application after release.* For the purposes of this provision, an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody.

(6) *Covered entities that are government programs providing public benefits.* (i) A health plan that is a government program providing public benefits may disclose protected health information relating to eligibility for or enrollment in the health plan to another agency administering a government program providing public benefits if the sharing of eligibility or enrollment information among such government agencies or the maintenance of such information in a single or combined data system accessible to all such government agencies is required or expressly authorized by statute or regulation.

(ii) A covered entity that is a government agency administering a government program providing public benefits may disclose protected health information relating to the program to another covered entity that is a government agency administering a government program providing public benefits if the programs serve the same or similar populations and the disclosure of protected health information is necessary to coordinate the covered functions of such programs or to improve administration and management relating to the covered functions of such programs.

(l) *Standard: Disclosures for workers' compensation.* A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

[65 FR 82802, Dec. 28, 2000, as amended at 67 FR 53270, Aug. 14, 2002]

CLALLAM COUNTY PROSECUTOR

June 29, 2012 - 2:26 PM

Transmittal Letter

Document Uploaded: 428539-Respondent's Brief.pdf

Case Name: State v. Vonna Pritchard

Court of Appeals Case Number: 42853-9

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Other: _____

Comments:

No Comments were entered.

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